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95-536

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

ISIDOR

DOROTH

PETITIONERS

VS.

PHILIP C. GRACE AND

DAVID A. SIEGEL

RESPONDENTS.

PETITIONER

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In the Supreme Court
of the United States

Isidor Friedman
Dorothy Friedman
Petitioners
vs.
Philip C. Grace and
David A. Siegel
Respondents

Petitioners' Reply Brief

I.

THE ISSUES RAISED ARE NOT NARROW –
THE ISSUES ARE:
COMPLIANCE WITH THE UNITED STATES
SUPREME COURT DECISIONS
AND APPLICATION OF "RES JUDICATA"

A. The Bankruptcy Court Has Not Complied With the Controlling United States Supreme Court Opinion

A reading of Matter of Garman, 643 F2d 1252 (7th Cir. 1983) and the In re Krep, 700 F2d 372 (7th Cir. 1983) indicates the lower courts were adding elements needed to prove non-dischargability which neither the statue nor the courts decision in Gerdes v. Lustgarden, 266 U.S. 321 contained. In Garman, only actual reliance is said to be required at p. 1258 – in Kreps, the court goes further. This requires "reasonable" reliance at p. 375. This is judicial legislation, as neither this court nor the statute (Bankruptcy Act 17(a)(2)) contained such a requirement. Further, these are 7th Circuit cases, not binding on the Bankruptcy Court in the case at bench in the 9th Circuit, while the Court's decision in Gerdes, 266 U.S. 321 is binding.

The fact is that prior to this

Court's opinion in Gerdes, 266 U.S. 321, reasonable reliance was not required by this Court or a lower court. See Forsyth v. Vehmeyer at 623, 177 U.S.; Strange v. Bradner, 5 S. Ct. 1038, 114 U.S. 555; Tindle v. Biriett, 27 S. Ct. 493; In re Bloemecke, 265 F343; In re Lewensohn, 104 F. 1006 and numerous other opinions. The Court's opinion in Gerdes confirmed this.

How then can the lower courts change a United States Supreme Court ruling by interpreting to include new elements? They cannot. This Court apparently needs to make this clearer. United States Supreme Court Rule 17.1(a) – the exercise of supervisory power is an important consideration favoring the granting of a writ. See Egan v. City of Aurora, Illinois, (1961) 81 S. Ct 684, 365 U.S. 514, where review was granted because a lower court decided a case based in a view inconsistent with the view taken by this Court. Also see, Wilkinson v. U.S., (61) 8 S. Ct. 567, 365 US 399.

B. This Court Should Grant Review to Clarify "Res Judicata"

Respondents' brief indicates how easily res judicata can be misinterpreted. Respondents are using the argument of "actually litigated" as the equivalent of "necessary for the judgment." As indicated by the Petition for Certiorari, the doctrine of res judicata requires an issue be

"necessary for the judgment." However, it is easy to see how the doctrine will tend to be relaxed in practical application as Respondents are arguing. Because due process requires a full hearing on essential elements, this relaxed standard should be guarded against. A review by this Court will thus have a broad effect on all cases involving res judicata.

II.

RESPONDENTS' ARGUMENTS THAT BECAUSE RESPONDENTS PROVED "REASONABLE RELIANCE" THE DOCTRINE OF RES JUDICATA IS SATISFIED HAS NO LEGAL BASIS

Respondents have cited no authority for their position that because Respondents set forth evidence for reasonable reliance, the doctrine of res judicata is satisfied. See Page 5, Respondents' Brief in Opposition. This is not a factor in assessing whether res judicata applies.

III.

PETITIONERS HAVE HAD NO OPPORTUNITY TO PRESENT EVIDENCE OF REASONABLE RELIANCE

Once res judicata is invoked and accepted as in the case at Bench, the

party against whom it is invoked has no opportunity to present other evidence. The first judgment in essence becomes the judgment in the pending case resulting in Petitioners not having "due process" (ie a full hearing) on the most recent adversary compliant by Respondents.

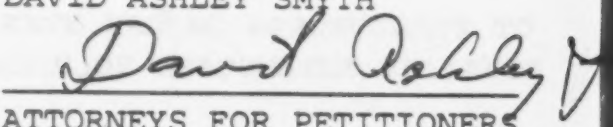
IV.

LOWER COURTS CANNOT INTERPRET THE SUPREME COURT'S INTENTION WHEN THIS COURT LISTED ONLY CERTAIN ELEMENTS FOR NON-DISCHARGABILITY AND BY THIS INTERPRETATION ADD ELEMENTS

Respondents' arguments (Page 5) illustrate the need for this Court's supervision of the lower courts. The elements of a cause of action are basic. When this Court listed these elements for non-dischargability and others (Gerdes v. Lustgarden, 266 U.S. 321) there was no ambiguity that needed resolving by the lower courts. There was certainly no room for lower courts to interpret and then add elements--such a procedure undermines a judicial system based on superior and inferior courts. And in such a system, the higher and highest court must at times exercise its supervisory capacity. The exercise will be beneficial to the whole system and is a reason this petition should be granted.

Respectfully submitted,

NOV. 3, 1995 DAVID ASHLEY SMYTH



ATTORNEYS FOR PETITIONERS